United States Court of Appeals

for the Second Circuit

APPELLEE'S BRIEF

ORIGINAL

75-7516

United States Court of Appeals

FOR THE SECOND CIRCUIT

B

ROBERT G. BURDEWICK, individually and as representative of the Nassau County Patrolmen's Benevolent Association,

Plaintiff-Appellant,

—against—

P/S

DENIS E. DILLON, District Attorney of the County of Nassau, State of New York, RALPH G. CASO, County Executive in and for the County of Nassau, State of New York, and LOUIS J. FRANK, Commissioner of Police, Nassau County of the State of New York,

Defendants-Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF NEW YORK

BRIEF OF DEFENDANTS-APPELLEES

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United States Court of Appeals

FOR THE SECOND CIRCUIT

ROBERT G. BURDEWICK, individually and as representative of the Nassau County Patrolmen's Benevolent Association,

Plaintiff-Appellant,

—against—

DENIS E. DILLON, District Attorney of the County of Nassau, State of New York, RALPH G. CASO, County Executive in and for the County of Nassau, State of New York, and LOUIS J. FRANK, Commissioner of Police, Nassau County of the State of New York,

Defendants-Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF NEW YORK

BRIEF OF DEFENDANTS-APPELLEES

Counter Questions Presented

1. Whether plaintiff-appellant's complaint fails to allege an actual case for controversy?

The Court below did not pass on this issue.

2. Is § 8-14.0 of the Administrative Code of the County of Nassau valid and constitutional?

The Court below answered in the affirmative.

3. Is § 426(3) of the Election Law of the State of New York valid and constitutional?

The Court below did not consider plaintiff-appellant's candidacy prohibited by § 426(3) of the Election Law of the State of New York.

4. Is plaintiff-appellant's suit barred because of *res judicata*?

The Court below did not pass on this issue.

5. Is plaintiff-appellant's candidacy barred by § 8-14.0(b) of the Administrative code of the County of Nassau?

The Court below answered in the affirmative.

Counter Statement of Facts

Plaintiff-appellant is a Nassau County policeman and resides in the said County. He alleges that he desires to seek appointment to the North Merrick School Board for a position to occur on or about June 19, 1975, which time has since passed.

Prior to the institution of the within action, plaintiff-appellant sought a determination from the Nassau County Police Department concerning the application of § 2103-a of the Education Law and on the legality of his accepting and/or running for a position on the school board (presumably the North Merrick School Board). (*See* paragraph 10 of the complaint, A. 3a).* On November 19, 1974, Louis J. Frank, Commissioner of Police of Nassau County, advised Officer Burdewick that § 8-14.0 of the Administrative Code of the County of Nassau constituted a prohibition to said candidacy (A. 13a) if he desired to remain a police officer of Nassau County.

Plaintiff-appellant, individually and as a representative of the Nassau County Patrolmen's Benevolent Association, thereafter instituted the within action on or about March 7, 1975 against defendants-appellees seeking a declaration that § 8-14.0(b) of the Administrative Code of the County of Nassau and § 426(3) of the Education Law of the State of

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*A.___ is for Appendix unless otherwise indicated.

New York are unconstitutional as currently worded and that the defendants-appellees shall not enforce said provisions against plaintiff-appellant.

Defendants-appellees, on or about April 2, 1975, served and filed a notice of motion seeking summary judgment on the grounds that no factual issues exist and that § 8-14.0(b) of the Administrative Code of the County of Nassau is constitutional and that plaintiff-appellant is not entitled to the relief requested. In support of defendants-appellees' motion are affidavits from the office of the County Attorney of Nassau County and Louis J. Frank, Police Commissioner of Nassau County.

On August 15, 1975, United States District Court Judge John R. Bartels issued a memorandum decision and order which was entered on August 18, 1975. This memorandum decision and order granted defendants-appellees' motion and dismissed the instant complaint. Judge John R. Bartels found § 8-14.0(b) of the Adminsitrative Code of the County of Nassau to be constitutional.

On August 27, 1975, plaintiff-appellant filed and served a notice of appeal from said adverse order to the United States Court of Appeals for the Second Circuit.

POINT I

Plaintiff-appellant's complaint fails to allege an actual case for controversy.

Although the affidavit of Neil Cahn in support of the motion for summary judgment (A. 17a) contended that the instant matter presented "an actual case and controversy ripe for adjudication by this Court", it is clear that such is not the case for the following reason, Paragraph 11, (A. 3a) of the complaint, may be an indication that he was proposing to undertake political activity, however, there was no allegation in the complaint of any threatened

criminal prosecution. A reading of paragraph 8, (A. 7a) of the complaint, clearly indicates that plaintiff-appellant has not been prosecuted for violating § 426(3) of the Election Law of the State of New York or § 8-14.0 of the Administrative Code of the County of Nassau, nor has he been threatened with prosecution.

It is therefore submitted that *Lecci* v. *Cahn*, 493 F.2d 826 (2d Cir. 1974) is controlling with respect to a lack of a justiciable controversy in the case at bar.

POINT II

Section 426(3) of the Election Law of the State of New York and section 8-14.0 of the Administrative Code of the County of Nassau are valid and constitutional.

In the recent case of *Perry* v. *St. Pierre*, 518 F.2d 184 (2d Cir. 1975), rehearing denied *en banc* ——— F. 2d——— (July 23, 1975) motion by defendant for summary judgment granted U.S.D.Ct. N. Dist., N.Y. October 28, 1975, the court stated:

> "This field of constitutional law has been recently replowed. The Supreme Court in *U.S. Civil Service Commission* v. *National Assn. of Letter Carriers*, 413 U.S. 548, 556 93 S.Ct. 2880, 2886, 37 L.Ed.2d 796, 804 (1973) and *Broadrick* v. *Oklahoma*, 413 U.S. 601, 616, 93 S.Ct. 2908, 2918, 37 L.Ed.2d 830, 842-43 (1973), reaffirmed the doctrine of *United Public Workers* v. *Mitchell*, 330 U.S. 75, 67 S.Ct. 556, 91 L.Ed. 754 (1945), that Civil Service employees may be prohibited from engaging in specified partisan political activities.
>
> [1-4] The statute is not "substantially overbroad" as having a "chilling effect" on free speech, cf. *Dombrowski* v. *Pfister*, 380 U.S. 479, 85 S.Ct. 1116, 14 L.Ed.2d 22 (1965), when judged in relation to its regulation of constitutionally unprotected conduct rather than "pure speech." *Broadrick* v. *Oklahoma*,

> *supra*, 413 U.S. at 615, 93 S.Ct. at 2918. Perry cannot assert that it is facially unconstitutional because his act of running for office perforce "attempt[ed] to influence any voter at...any election", § 88, and is thus clearly within the ambit of the statute, id., 413 U.S. at 610-11, 93 S.Ct. at 2914-15. A candidacy must, by its very purpose, influence voters one way or another and the chance that other constitutionally protected speech might hypothetically be drawn within the terms of § 88 cannot be our concern. Id. The statute does not deny equal protection by singling out police officers from other municipal employees because "a State can hardly be faulted for attempting to limit the positions upon which such restrictions are placed " 413 U.S. at 607 n. 5, 93 S.Ct. at 2913. Nor is the statute void for vagueness and indefiniteness, id., 413 U.S. at 607-08, 93 S.Ct. at 2913-14; *Letter Carriers*, *supra*, 413 U.S. at 575-80, 93 S.Ct. at 2895-98."

The reasoning contained in the *Perry* case, cited *supra*, is equally applicable to the case at bar and is controlling. It is clear that a police officer does not have rights higher than those individuals who are subject to the Hatch Act. In addition, *Paulos* v. *Breier*, 507 F.2d 1383 (7th Cir. 1974) further substantiates defendants-appellants' contention that both § 426(3) of the Election Law of the State of New York and § 8-14.0 of the Administrative Code of the County of Nassau are valid and constitutional.

Plaintiff-appellant relies upon *Mancuso* v. *Taft*, 371 F. Supp. 574 (1972), *aff'd*, 476 F.2d 187 (1st Cir. 1973) to support his contention of unconstitutionality. However, the 1st Circuit was careful to point out at 476 F.2d, 198:

> "Finally, we note that the constitutionality of the Hatch Act and an analogous state statute is presently before the Court. *National Ass'n of Letter Carriers and Broadrick, supra.*"

It is therefore clear that the 1st Circuit decision in the *Mancuso* case, cited *supra*, as prior to the States Supreme Court decision in *National Ass'n of Letter Cariers and Broadrick*, *supra*, and therefore the *Mancuso* case is not controlling or decisive with respect to the case at bar.

POINT III

Plaintiff-appellant's suit is barred because of *res judicatæ*.

The constitutionality of § 426(3) was upheld in the State courts. In *Lecci* v. *Cahn*, 493 F.2d 826 (2d Cir. 1974) the Court stated at page 827:

> "On September 13, 1970, the plaintiff brought such an action in the Supreme Court, County of Nassau, State of New York. On November 30, 1970 Justice Theodore Velsor, in an unreported opinion,* held the statute constitutional, relying upon the previous opinion of the Appellate Division in *Lecci* v. *Looney*, 33 A.D.2d 916, 307 N.Y.S.2d 594 (2d Dep't), leave to appeal denied, 26 N.Y.2d 612, 310 N.Y.S.2d 1025, 258 N.E.2d 729 (1970). The decision of the Supreme Court was affirmed by the Appellate Division without opinion on September 27, 1971, 37 A.D.2d 779, 325 N.Y.S.2d 400 (2d Dep't), and leave to appeal to the Court of Appeals was denied without opinion, 29 N.Y.2d 486, 326 N.Y.S.2d 1025, 276 N.E.2d 628 (1971). A petition for a writ of certiorari was denied by the United States Supreme Court on April 17, 1972, 405 U.S. 1073, 92 S.Ct. 1497, 31 L.Ed.2d 807."

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*Justice Theodore Velsor's memorandum decision and judgment are annexed hereto and marked Exhibit A and Exhibit B at pages 10 and 13 respectively.

It is therefore beyond cavil that the Nassau County Patrolmen's Benevolent Association is bound by *res judicata* because of the State court judgment and is a complete bar to the within action. In the circumstances of this appeal, the requirements of statutory full faith and credit pursuant to 28 U.S. Code § 1738(c) and of *res judicata* are substantially identical on the constitutionality of § 426(3) of the Election Law and act as a bar to the Nassau County Patrolmen's Benevolent Association action. *Riley* v. *New York Trust Co.*, 315 U.S. 343, 349 (1942); *Thistlethwaite* v. *City of New York*, 497 F.2d 339, 341 (2d Cir. 1974), *cert. denied*, 419 U.S. 1093 (1974) 1B J. Moore, *Federal Practice* ¶ 0.406[1] (2d ed. 1974).

It is therefore clear that the constitutionality of § 426(3) of the Election Law of the State of New York has been fully litigated by the Nassau County Patrolmen's Benevolent Association in the State courts, and the decisions must be given *res judicata* effect. *See*, *Johnson* v. *Department of Water and Power*, 450 F.2d 294 (9th Cir. 1971), *cert. den.*, 405 U.S. 1072 (1972); *Spampinato* v. *City of New York*, 311 F.2d 439 (2d Cir. 1962), *cert. den.*, 372 U.S. 980 (1963), *reh. den.*, 374 U.S. 818 (1963); *Murray* v. *Oswald*, 333 F.Supp. 490 (S.D.N.Y. 1971); *Taylor* v. *New York City Transit Authority*, 309 F.Supp. 785, 790 (E.D.N.Y. 1970), *aff'd* 433 F.2d 665 (2d Cir. 1970).

Plaintiff-appellant, Robert G. Burdewick, may argue that this instant suit is brought in an individual as well as a representative capacity and that his individual rights were not litigated prior to this suit. However, it is the contention of the defendants-appellees that the reasoning in Point II of this brief with respect to the merits would defeat his claim on both § 426(3) of the Election Law of the State of New York as well as § 8-14.0 of the Administrative Code of the County of Nassau aside from the *res judicata* argument presented.

POINT IV

Plaintiff-appellant's candidacy is barred by section 8-14.0(b) of the Administrative Code of the County of Nassau which is valid and constitutional.

It is respectfully submitted that plaintiff-appellee misinterprets § 2103-a of the Education Law of the State of New York, which states:

> § 2103-a. Policemen and firemen on boards of education
>
> Notwithstanding any general, special or local law, ordinance or charter provision to the contrary, or any rule or regulation, policemen and firemen employed by any municipal subdivision of the state or police district provided they are otherwise eligible, may be candidates for election and serve as members of boards of education in school districts located: (1) other than in the municipality where they perform their duties as policemen or firemen on a regular basis, or (2) unless prohibited by the legislative body for whom they are employed, in school districts located in the locality where they perform their duties as policemen or firemen. Added L.1974, c. 949, § 1.
>
> Effective Date. L.1974, c. 949, § 2, effect on the 90th day after June 13, provided that this section shall take 1974.

Assuming, arguendo, § 426(3) of the Election Law bars his candidacy for election to the North Merrick School Board, § 2103-a of the Education Law removes that restriction. However, (1) and (2) of § 2103-a of the Education Law reimposes the bar to plaintiff-appellant.

Plaintiff-appellant's candidacy for the North Merrick School Board is barred because he resides in the County of

Nassau, as evidenced by Exhibit C annexed to the complaint (A. 12a), and the aforesaid School Board is located in said County. However, more to the point, is § 8-14.0(b) of the Administrative Code of the County of Nassau which prohibits plaintiff-appellant's candidacy and which section is consistent with and authorized by section 2103-a of the Education Law of the State of New York.

Plaintiff-appellant's argument contained in his brief at pages 8 and 9, concerning the mere nomination aspect of an election, fails to consider that the act of nomination is part of the process of choosing a person for office and is fully a component part of candidacy for public office which is barred by the aforementioned section of the Administrative Code of the County of Nassau. *Brickman* v. *Board of Elections of the City of New York*, 248 App.Div. 467, 290 N.Y.S. 805, 806 (1st Dept. 1936).

Conclusion

The order of the Court below should be affirmed.

Respectfully submitted,

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NATALE C. TEDONE,
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Deputy County Attorney
Of Counsel

Exhibit A

Memorandum

Supreme Court, Nassau County—Special Term Part I

Index #11345/70
Cal. #52, 10/26/70

BY Velsor, *J.*
DATED 11/30/70

EDWARD LECCI, individually and as representative of the Nassau County Patrolmen's Benevolent Association,

Plaintiff,

vs.

WILLIAM CAHN, District Attorney of Nassau County of the State of New York, FRANCIS B. LOONEY, Commissioner of Police, Nassau County of the State of New York,

Defendants.

MORRIS H. SCHNEIDER
County Attorney of Nassau County
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RICHARD HARTMAN, ESQ.
Attorney for Plaintiff
300 Old Country Road
Mineola, N.Y. 11501

Defendant moves to dismiss the complaint in this action for a declaratory judgment. Upon such a motion, the complaint is not dismissed unless it is clear that a declaratory judgment is not a proper remedy (see *Dun & Bradstreet Inc.* v. *City of New York*, 276 N.Y. 198, 207). If there is a right to a declaration, dismissal must be denied (*Plaza Mgt. Co.* v. *City Rent Agency*, 31 A.D. 2d 347, 350 *aff'd* 25 N.Y. 2d 630); and where no issues of fact are present, the appropriate declaration should be made (*St. Lawrence Univ.* v. *Theological School of St. Lawrence University*, 20 N.Y. 2d 317).

The complaint in this action seeks a declaration that Election Law, section 426(3) is unconstitutional. The statute provides in pertinent part that a member of a police force who contributes money to, or solicits, collects, or receives any money for any political fund, or becomes a member of any political club, association, society, or committee is guilty of a misdemeanor. For the purposes of this motion, no issues of fact are raised, the allegations of fact in the complaint being deemed true. Under the circumstances, this Court will proceedd in the manner prescribed in *Plaza Mgt. Co.* v. *City Rent Agency* (31 A.D. 2d 347, 350, *aff'd.* 25 N.Y. 2d 630).

In the opinion of this Court, the reasoning of the Appellate Division in *Matter of Lecci* v. *Looney* (33 A.D. 2d 916) in dealing with rule 14, art. 6 of the Rules and Regulations of the Nassau County Police Department is equally applicable to the statute (Election Law, section 426(3)).

In the cited case wherein the right of the Nassau County Police Department to promulgate a rule (rule 14, art. 6), which prohibited certain political activities on the part of members of the force, was challenged in an Article 78 proceeding, the constitutionality of the rule was specifically raised. In disposing of the question, the Court stated on p. 917, "In our opinion the subject rule comports

with sound administration policy that the removal of police personnel from active politics and from active participation in any movement for the nomination of election of candidates for political or public office is conducive to effective maintenance of discipline and the preservation and promotion of the integrity and efficiency of the Police department and its personnel. Accordingly, the promulgation of the subject rule, applicable to those who seek employment or seek to be retained in the employ of the Police Department, is the Commissioner's prerogative, and in our opinion, is not vulnerable to petitioner's aforesaid challenges."

In *People ex rel Clifford* v. *Scannell*, 74 App. Div. 406, *aff'd.* 173 N.Y. 606, cited with approval in *Lecci, supra*, the Court disposed of the argument as to unconstitutionality in the following language at pp. 413-414, "It is said, however, that unless the acts of the relator in this respect be upheld, then his rights as a citizen are abridged, therefore, the act and the rule are in violation of the State Constitution (Art. 1, §§1, 8). There is no foundation for the claim either in law or reason. Neither the fire department, acting through its officers, nor the Legislature of the State, has in the slightest degree abridged the rights of the relator in any respect... It is, therefore, erroneous to say that his right of citizenship is abridged in any particular, and the courts have so held." (citing cases)

In the light of the foregoing authorities, the motion is granted to the extent of awarding summary judgment to the respondents declaring the statute in question to be constitutional.

Settle judgment on notice.

Theodore Velsor,
J.S.C.

Exhibit B

Judgment

Index No. 11345/70

At a Special Term, Part I of the Supreme Court of the State of New York, in and for the County of Nassau at the Supreme Court Building Supreme Court Drive, Mineola, New York, on the 26th day of February, 1971.

Present:
Hon. Theodore Velsor,
Justice.

(Same title)

The defendants, WILLIAM CAHN and FRANCIS B. LOONEY, having moved this Court for an Order dismissing the complaint herein on the grounds that the said complaint fails to set forth facts sufficient to constitute a cause of action, or, in the alternative, that on Order be made, pursuant to Section 3001 of CPLR declaring that Section 426(3) of the Election Law of the State of New York, the subject of complaint herein, is constitutional and valid; upon reading the complaint herein dated September 13, 1970, the Notice of Motion herein dated September 23, 1970, the affidavit of Louis Schultz, Senior Deputy County Attorney of Nassau County, affirmed September 23, 1970; the Affidavit in Opposition to the Motion by Richard Hartman, Esq., duly sworn to October 5, 1970; and said motion having regularly come on before Hon. Theodore Velsor on October 26, 1970, in Special Term, Part I of this Court having heard Louis Schultz, Senior Deputy County Attorney of Nassau County, in support of the motion on behalf of defendants and Richard Hartman, Esq., in

opposition thereto on behalf of plaintiff and due deliberation having been had thereon and a decision in writing having been made by this Court dated November 30, 1970.

NOW, on motion of JOSEPH JASPAN, County Attorney of Nassau County, Attorney for defendants it is

ORDERED, ADJUDGED AND DECREED, that the defendants have judgment against the plaintiff herein declaring Election Law Secton 426(3) to be constitutional.

ENTER,

Theodore Velson,
J.S.C.

Granted: Feb. 26, 1971
Harold W. McConnell, Clerk

Entered: Mar. 2, 1971
Harold W. McConnell,
County Clerk of Nassau County

AFFIDAVIT OF SERVICE BY MAIL

State of New York
ss
County of Nassau

Gasper L. Clemente, being duly sworn, deposes and says: That he is President of the Davenport Press, Inc., printers of the attached Brief in the matter of Robert G. Burdewick Against Denis E. Dillon, District Attorney of the County of Nassau State of New York, Ralph G. Caso

That on the 7th day of Nov; 1975 he served 3 copies of said Brief on

Hartman and Alpert
~~Attorneys for Plaintiff~~-Appellant
300 Old Country Road
Mineola, New York
11501

by depositing same, securely enclosed in a post paid wrapper in a Post Office regularly maintained by the United States government at Mineola, New York, County of Nassau, directed to said attorney(s) at the address listed above, that being the address within the state designated for that purpose upon the preceding papers in this action, or the place where they then kept an office between which places there was and now is a regular communication by mail.

Deponent is over the age of 21 years.

Gasper L Clemente

Sworn to before me this
7th day of Nov; 1975

KEVIN G. SLEICHER
NOTARY PUBLIC, State of New York
No. 30-4502141
Qualified in Nassau County
Commission Expires March 30, 1977

K G Sl